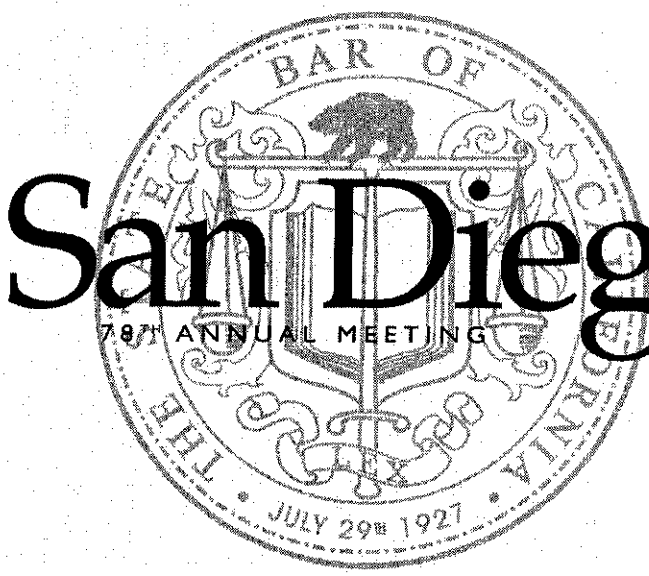

San Diego

78TH ANNUAL MEETING

Program #106

Recent Significant Developments Affecting the Law of Lawyers

Friday, September 9, 2005
2:15 p.m.- 4:15 p.m.

Sponsored by: Committee on Professional Responsibility and Conduct

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RECENT SIGNIFICANT DEVELOPMENTS AFFECTING THE LAW OF LAWYERS

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CASE SUMMARIES

Abbott v. Internal Revenue Service (9th Cir. 2005) 299 F.3d 1083
Conflicts of Interest

Taxpayer Peterson hired attorney Harkavy to handle a matter before the IRS. While still representing the taxpayer, attorney Harkavy submitted a proposal to act as an expert witness on behalf of the IRS. The IRS hired Harkavy in response to his proposal. When the taxpayer discovered Harkavy's work for the IRS, the taxpayer moved to vacate tax court decisions based on a settlement of tax issues on which Hakavy had advised the taxpayer.

The court held that attorney Harkavy did not have a conflict under ABA Model Rule 1.7. Harkavy did not represent the IRS adversely to the taxpayer, so Rule 1.7(a) did not apply. Nor did Harkavy's work on an unrelated matter for the IRS materially limit his work for the taxpayer; therefore, Rule 1.7(b) did not apply. The Ninth Circuit did not discuss whether California law or the ABA Model Rules were applicable but simply responded to the taxpayer's reliance upon Model Rule 1.7. Responding to the taxpayer's last-minute argument based on California Rule 3-310(C)(3) and *American Airlines v. Sheppard Mullin Richter & Hampton*, 96 Cal.App.4th 1017 (2002), the court noted that the taxpayer did not and could not claim that Harkavy's work for the IRS imperiled the taxpayer's confidential information. Therefore, the court held, Rule 3-310(C)(3) and *American Airlines* were inapplicable. Throughout the court's decision, it emphasized the concept that a private lawyer should not be precluded from performing services for a government agency merely because the lawyer represents clients in dealings with the agency.

Apple Computer, Inc. v. Superior Court (2005) 126 Cal.App.4th 1253
Conflicts of Interest
Disqualification
Class Actions

A plaintiff in a class action lawsuit, an attorney, was represented by the law firm that employed him and a second firm that served as co-counsel with his firm for other cases. Defendant moved to disqualify both firms. Defendant claimed a conflict of interest existed because the plaintiff's close association with both firms would allow them to maximize attorney's fees to the detriment of the putative class. The trial court denied the motion, and the court of appeal issued a writ. *Held*: An insurmountable conflict of interest exists between the class representative and class counsel on the one hand, and the

putative class on the other. The first firm must be disqualified because if the interests of the class are to be adequately protected, the roles of class representative and class attorney cannot be played by the same person. Substituting a partner as counsel will also not suffice. The prohibition is not limited to common fund cases. The second firm must be disqualified because of the close working relationship with the first firm and the plaintiff. A conflict of interest may exist based on the relationship between a class representative and class counsel even though the class representative will not share in attorney's fees when evidence suggests the two firms are interdependent, or financially linked.

Barton v. United States District Court (9th Cir. 2005), Case No. 05-71086
Confidentiality

Before suing a pharmaceutical company for product defects, plaintiffs responded to an online questionnaire posted at the web site of plaintiffs' counsel. In submitting the form, plaintiffs agreed that they were not seeking legal advice or forming an attorney-client relationship. The court held that this disclaimer was not adequate to defeat confidentiality, because it did not warn the potential clients in plain English of the lack of "confidentiality" of their submission. In addition, potential clients – not just clients – are entitled to claim privilege. Evid. Code § 952.

Boranian v. Clark (2004) 123 Cal.App.4th 1012
Estates & Trusts
Legal Malpractice
Third Party Liability
Divided Loyalty

Without telling her children, an elderly woman refinanced her home and purchased a laundromat for a boyfriend. When the woman became terminally ill, her boyfriend asked an attorney to prepare a will and documentation of a gift to himself. In drafting the documents, the attorney relied completely on information from the woman's boyfriend that he was to get the laundromat while her children were to receive the remainder of the estate subject to the debt owed for the laundromat. Visiting the woman on her deathbed, the attorney paraphrased the will contents to the client, his secretary read the will to her, and the client signed the documents. A will contest ensued, and the decedent's boyfriend ultimately accepted $5,000 in exchange for any claim to the laundromat. Thereafter, the children of the decedent sued the attorney for legal malpractice and breach of fiduciary duty. The trial court entered judgment in favor of the decedent's children. The Court of Appeal reversed. *Held*: The attorney's primary duty is owed to the client and not the beneficiary. Although a lawyer providing testamentary legal services may have a duty to act with due care for the interests of a third party beneficiary, liability to a third party will not be imposed if there is a question of whether the third party was in fact the intended beneficiary, and the beneficiary's claim is that the lawyer failed to adequately ascertain the testator's intent or capacity.

Brand v. 20th Century Insurance Company (2004) 124 Cal.App.4th 594
Conflicts of Interest
Disqualification
Expert Witnesses

Attorney represented defendant company from 1988-1991 as coverage counsel, and in 1990 presented a 12-week seminar to defendant concerning company's claims handling practices and procedures. In 2002, plaintiff designated the same attorney to provide expert testimony in her bad faith case against defendant. Defendant moved to exclude the expert testimony of the attorney on grounds that the attorney had received confidential information as defendant's former counsel. The trial court denied the motion. The court of appeal reversed. *Held:* The two engagements must be deemed substantially related due to similar subject matter. Attorney's knowledge of confidential information must be presumed, and therefore presents a conflict of interest for defendant. Despite time lapse of 12 years since attorney provided counsel to defendant, defendant is not required to run the risk that attorney will divulge detrimental confidential information in testifying against it. The attorney must be disqualified from serving as an expert witness.

Burlington Northern & Sante Fe Ry. v. United States District Court (9th Cir. 2005) 403 F.3d 1042
Confidentiality
Discovery

Plaintiffs sued a railroad in Montana state court, alleging that the railroad had contaminated plaintiffs' property. The railroad removed the case to federal court. In response to plaintiffs' document requests, the railroad served "boilerplate" privilege objections and failed to provide a privilege log. Five months after the railroad had served its responses to the document requests, the district court ruled that the railroad's failure to provide a privilege log constituted a waiver of attorney-client privilege. On writ review, the Ninth Circuit declined to overturn the district court order. The court held that there is no hard-and-fast rule as to when and in what circumstances a privilege log must be provided. Courts should make a case-by-case determination, taking into account the following factors: the degree to which the objection or assertion of privilege enables the party seeking discovery and the court to evaluate the privilege claim, the magnitude of the documents at issue, and whether the circumstances of the case make discovery "easy" or "hard." Applying these factors to the case at bench, the court ruled that the railroad's five-month delay was sufficient standing alone to justify the district court's order. In addition, the railroad was a "sophisticated corporate litigant and a repeat player in environmental lawsuits and litigation involving the site that is the subject of the lawsuit." Based on these factors, the Ninth Circuit denied the railroad's petition for a writ of mandamus.

Cal West Nurseries v. Superior Court (2005) 129 Cal.App.4th 1170
Conflicts of Interest
Disqualification
Successive Representation

The appellate court reversed the trial court's denial of a client's motion to disqualify a law firm when the firm appeared for Client A in a case in which one of the firm's current clients (Client B) was a party. When Client B objected to the firm's involvement, the law firm immediately withdrew from representing Client A concerning Client A's dispute with Client B, but remained in the case to represent Client A against other parties. Although the law firm was no longer representing any party adverse to Client B in this case, Client B nonetheless moved to disqualify law firm from representing Client A against other parties. The court found that the firm's withdrawal from the portion of its original representation that involved disputes between Client A and B was not sufficient to eliminate a conflict of interest and did not support the trial court's denial of the disqualification motion. The court held that the duty of loyalty - rather than the duty of confidentiality - to Client A prohibited the firm from representing Client B to any extent in the action, even though the appellate record failed to disclose exactly what was involved in the disputes between Client A and the other parties to the case.

Chapman v. Superior Court (2005) __ Cal.App.4th __.
Attorney-client Relationship
In-house Counsel
Legal Malpractice

In an underlying criminal mater, defendant, a former member of the Board of Commissioners of the San Diego Unified Port District, pleaded guilty to violating Government Code section 1090 while on the Board. In 1998, the Port District negotiated an agreement to purchase a power plant and to have Duke Energy Power Services operate it for ten years. In April, 1999, Board Member told plaintiff Attorney, the Port District's in-house legal counsel at that time, that he and Duke entered into a written contract to attempt to acquire a power plant. In May 2000, however, the arrangement changed from one of looking for business opportunities with Duke to one of consulting. In April 2003, the District Attorney charged Board Member with violating section 1090 by "becoming financially interested in the contract between the . . . Port District and the city of Chula Vista to expand the enterprise zone." In September 2003 Board Member sued Attorney for legal malpractice for wrongfully failing to advise Board Member of section 1090 and that his arrangement with Duke required him to resign from the Board rather than merely disclose income from Duke and to abstain from voting on Port District matters involving Duke. The trial court denied the Port District's and Attorney's motion for summary judgment. The Court of Appeal issued a writ directing the trial court to grant the Port District's and Attorney's motion for summary judgment. The Court of Appeal rejected the Port District's and Attorney's arguments that Attorney, an employee of the Port District, had no attorney-client relationship with Board Member; the court held that on the facts presented, there was a triable issue of fact. However, the court went to hold as a matter of first impression in California that public policy prohibited Board Member

from seeking indemnification for his own commission of a crime. This public policy was particularly strong here where he sought damages from the very entity, Port District, the criminal statute was supposed to protect. The Court noted that Board Member had pleaded guilty to the criminal charges, and those charges included an element of willfulness.

Commissioner of Internal Revenue v. Banks (2004) 125 S. Ct. 826
Attorneys Fees

In this case, the United States Supreme Court considered whether a successful plaintiff in an employment case may exclude from the plaintiff's taxable income contingent attorney's fees paid to obtain a judgment. The Court rejected the arguments the taxpayer advanced in this case against including the portion of the proceeds of a judgment used to pay attorney's fees in earned income. First, the Court held that the anticipatory assignment doctrine applied. This doctrine prevents a taxpayer from agreeing in advance to assign income to another as a means of avoiding realizing income. Second, the Court rejected arguments based on the concept of treating attorney and client as having acted as a partnership or a joint venture. To the contrary, the attorney-client relationship is an agency relationship, and the client at all times retains ultimate control and dominion over the plaintiff's cause of action.

The Court noted that its decision applied only to taxpayers subject to alternative minimum tax. Taxpayers not subject to AMT may deduct attorney's fees as miscellaneous deductions "subject to the ordinary requirements," but such a deduction is not available for AMT purposes.

The Court declined for various reasons to consider additional arguments as to why the attorney's fee portion of the judgment should not be considered earned income, including the impact of the American Jobs Creation Act, 118 Stat. 1418, which allows deduction of fees incurred to recover judgments for certain claims of unlawful discrimination. That statute was enacted after the events at issue in the Court's decision.

Forensis Group, Inc. v. Frantz, Townsend & Foldenauer (2005) __ Cal.App.4th __
Expert Witness

In this case, a group of clients (Family) sued its former expert witnesses for professional negligence. The Court of Appeal considered whether the expert witnesses could seek equitable indemnification against the attorneys who retained them in the underlying case. The underlying case was an unsuccessful wrongful death/products liability case filed on behalf of the decedent's surviving Family. The trial court granted Law Firm's motion for summary judgment and denied Experts' motion to set aside the judgment, but the Court of Appeal reversed. The Court of Appeal reasoned that public policy concerns underlying the "attorney exception" to equitable indemnity claims did not apply to the particular claims the expert witnesses sought to bring against the attorneys in this case. Allowing the case to proceed did not present a conflict for law firm, or jeopardize

Family's confidential information, because the experts' work in the underlying case related to technical matters of which Family would have no personal knowledge.

Goldberg v. Warner/Chappell Music, Inc. (2005) 125 Cal.App.4th 752
Conflicts of Interest
Substantial Relationship
Vicarious Disqualification/Imputation

The Court of Appeal held that, where the attorney who had briefly and informally consulted with the plaintiff on her employment contract with defendant company (and plaintiff's client) had left defendant's law firm three years before plaintiff filed the present alleging wrongful termination, employment discrimination and violation of state whistle-blower statutes, defendant's law firm need not be vicariously disqualified where the firm was able to show that no other lawyer who remained at the firm has consulted with the plaintiff nor obtained confidential information. The court cited to Model Rule 1.10(b), which permits a firm that has employed the conflicted lawyer in the past to continue representing its client if it can demonstrate that no present lawyer with the firm possesses confidential information material to the present action. The court emphasized that it would be a rare instance when a firm would be able to make such a showing. It appears, however, that the court was persuaded by the fact that the attorney had departed from the firm several years prior to the institution of the litigation, the attorney never opened a file or billed the client, and the firm's dealings with the plaintiff were limited to her contacts with the departed attorney. The court did not consider the apparent conflict which existed at the time of the consultation due to plaintiff's representation of the defendant company.

HLC Properties, Limited et al. v. Superior Court (MCA Records, Inc. et al.) (2005) 35 Cal.4th 54
Attorney-Client Privilege
Confidentiality
Estates

Plaintiff, HLC Properties, Ltd., initiated this action against defendants for allegedly underpaying royalties due on three recording contracts between Bing Crosby and defendants. During Crosby's lifetime he had various unincorporated business operations that he and his employees referred to as "Enterprises." After Crosby's death, the executor of his estate entered into a limited partnership agreement to form HLC Properties, an entity that would manage Crosby's remaining interests. Upon distribution of the estate, the executor was discharged. At issue during the pretrial discovery was the withholding of certain documents plaintiff claimed were privileged attorney-client communications. Plaintiff claimed that Enterprises or HLC, as its successor, was the holder of the privilege. Defendant claimed that the documents might provide critical support to its interpretation of the disputed royalty provision, and that the privilege belonged only to Crosby and then to his executor until the executor was discharged. The trial court found that Crosby held the privilege, and that it terminated upon his death. The court did not recognize plaintiff as a privilege holder. The court of appeal granted

the writ of mandate and found that Enterprises constituted an organization during Crosby's lifetime and therefore plaintiff, as Enterprise's successor, currently holds the attorney-client privilege. The Supreme Court granted review. *Held:* Unincorporated entities formed to manage the business affairs of a natural person can never hold attorney-client privileges in their own right. Crosby was the original client and holder of the privilege with respect to the documents. Pursuant to the Evidence Code, Crosby transferred the privilege to the executor of his estate upon his death, and the privilege ceased to exist upon the executor's discharge.

Howell v. Valley (2005) __ Cal.App.4th __
Attorneys Fees
Mandatory Fee Arbitration Act
Waiver/Defenses

In this case, the Court of Appeal considered whether a client may assert his Mandatory Fee Arbitration Act ("MFAA") arbitration rights without actually availing himself of arbitration to delay, and ultimately prevent, the resolution of a fee dispute with his former attorney. There, plaintiff Law Firm brought an action against defendant Client on a promissory note that Client had signed to memorialize an obligation for unpaid fees. In his answer, Client alleged a defense of estoppel based on Law Firm's failure to give the requisite section 6201(a) notice, even though the action proceeded for almost fifteen months without Client asserting that he wished to arbitrate the fee dispute. The trial court denied Law Firm's motion for summary judgment and dismissed the complaint. The Court of Appeal held that there was no triable issue of material fact and that Client waived his defense of lack of notice under section 6201; the court therefore held that summary judgment should have been granted in favor of Law Firm and reversed the order dismissing Law Firm's complaint. Further, the Court of Appeal held that Law Firm's summary judgment should have been granted because Law Firm's motion established all elements of its breach of contract claim and that Client's other defenses raised lacked merit.

People v. Jiang (2005) __ Cal.App.4th __, 2005 WL 1415186
Attorney-Client Privilege
Confidentiality

The defendant was arrested and charged with committing sexual offenses against an acquaintance. Upon release on bail shortly after his arrest, the defendant used his employer-issued laptop computer to prepare numerous documents for his attorneys regarding the charged offenses which he placed in a computer folder called "Attorney," and password-protected. The prosecutor subsequently subpoenaed the documents on the laptop from defendant's employer. The appellate court held that an employer's agreement waiving privacy did not preclude the employee's personal use of the computer. Based on defendant's substantial efforts to protect the documents from disclosure by password-protecting them and segregating them in a clearly marked folder, the appellate court found that the defendant's belief in the confidentiality of his attorney-client information was objectively reasonable.

Laguna Beach County Water District v. Superior Court (2004)
124 Cal.App.4th 1453
Attorney-Client Privilege
Confidentiality
Work Product Doctrine

This case involved a suit by a citizen for alleged defective construction of a reservoir near her home. In the underlying action, defendant claimed various affirmative defenses, including lack of knowledge of the dangerous condition. At an earlier date, the attorney for defendant had sent letters containing work product to auditors for the defendant. The plaintiff served deposition subpoenas in an attempt to obtain those letters. The trial court ruled that the applicable attorney-client privileges and/or work product protections had been waived, and ordered defendant to produce the documents. The trial court stated that the waiver occurred when defendant asserted an affirmative defense in which it emphasized its lack of knowledge of defects in the construction of a reservoir. The court of appeal issues a writ. *Held*: There is no waiver of the attorney-client privilege or work product doctrine. Some of the documents at issue deal with the defendant's post-construction investigation, have nothing to do with pre-construction knowledge, and therefore do not relate to the lack of knowledge defense. The remaining documents contain an attorney's response to an audit inquiry. The response contains thoughts and ideas about pending actions, and thus is clearly work product. Disclosure by an attorney of thoughts, impressions and conclusions to a third party (defendant's auditors) operates as a waiver of work product protection only when the information is divulged to a third party who has no interest in maintaining the confidentiality of the work product. In this case, the attorney made it clear that he did not intend to waive his protection; he sent the letters only at his client's request, and the top of each letter contained a notation in capitalized, underlined print that the communication was attorney-client privileged information. Attorney-client communications remain privileged even when sent to a public accountant performing a public function.

Maynard v. Brandon (2005) ___Cal.4th ___, 2005 DJDAR 8338
Mandatory Fee Arbitration Act
Request for Trial after Arbitration
Deadline for Trial Request

The defendants' former attorney sued them for his legal fees. They demanded arbitration under the Mandatory Fee Arbitration Act (MFAA), Business and Professions Code section 6200, et seq. Following an arbitration award in the lawyer's favor, the defendants demanded trial de novo, as authorized by the MFAA. Following an arbitration award in the former attorney's favor, the defendants replaced their counsel, and the new counsel demanded trial de novo, as authorized by the MFAA. However, '[d]ue to a miscommunication between defendants' attorney and his secretary,' their request was filed more than 30 days after the mailing of the notice of the award, and was untimely." The Supreme Court held that Section 473(b) cannot remedy a failure to meet the 30-day deadline for seeking a trial under the MFAA. The MFAA incorporates a procedure analogous to a conventional appeal, and as a general rule, Section 473(b) cannot extend

the period in which a party must file a notice of appeal. No persuasive authority exists for departing from this well-established principle. There is nothing to indicate that the legislature intended to subject the "inflexible" 30-day deadline for seeking a trial after fee arbitration to extension under Section 473(b). The Court explained that though this may work a hardship on clients who do not seek a timely trial following fee arbitration, the legislature determined that in the long run, clients benefit from an arbitration system that produces a binding result if the parties do not invoke the judicial process within a fixed period after an award. Compare *Pincay v. Andrews (9th Cir. en banc 2004) 389 F.3d 859* (attorney relieved from 30 day deadline for notice of appeal, based on excusable neglect due to failure to read applicable rule).

Osornio v. Weingarten (2004) 124 Cal.App.4th 304
Estate Planning
Legal Malpractice
Third Party Liability

Client came to attorney to draft new will naming care custodian as executor and sole beneficiary. Attorney drafted a will according to the client's request. Attorney did not advise client of provisions of Probate Code sections 21350 and 21351 concerning the presumptive disqualification of certain classes of donee, including care custodians of dependent adults, and certificates of independent review needed to overcome the presumption. Client therefore failed to obtain a certificate of independent review certifying that the transfer to the care custodian was not the product of fraud, menace, duress or undue influence. Upon client's death, beneficiary under prior will challenged new will. Care custodian failed to overcome the presumption of disqualification. Care custodian sued the attorney for testator alleging attorney breached duty to accomplish the testator's objective. Attorney demurred on grounds no duty owed to care custodian, and trial court sustained the demurrer without leave to amend. The court of appeal reversed. Upon conducting the six-part balancing test of *Lucas v. Hamm* (1961) 56 Cal.2d 583 and *Biakanja v. Irving* (1958) 49 Cal.2d 647, the court found that the attorney owed a duty of care both to the client-testator and the prospective transferee (1) to advise the client that failure to obtain the certificate would likely cause the intended transfer to fail, and (2) to recommend the client seek independent counsel in an effort to obtain a Certificate of Independent Review.

Pincay v. Andrews (9th Cir. En Banc 2004) 389 F.3d 853
Federal Procedure
Mistake/Relief

Client suffered an adverse judgment in a 15-year-long federal court case. Paralegal at law firm misread the Federal Rule of Civil Procedure regarding time to appeal and calendared the due date for the notice of appeal for 60 days rather than 30. After the 30 day deadline expired, but within a 30-day grace period during which a party can seek relief based on excusable neglect, attorney tendered a notice of appeal together with a request for an extension of time to file the notice within the 30-day grace period. The trial court granted relief. The 9th Circuit originally overturned the trial court. However,

the 9th Circuit then granted en banc rehearing. In a split decision the court held that under the criteria of *Pioneer Investment Services Co. v. Brunswick Associated Ltd. Partnership* (1993) 507 U.S. 380 [(1) the danger of prejudice to the non-moving party, (2) the length of delay and its impact on the proceedings, (3) the reason for the delay, and (4) whether the moving party acted in good faith], the trial court was within its discretion in deeming the error "excusable neglect" even though the reason for the delay – failure to read an applicable rule – is "one of the least compelling excuses that can be offered." Under the facts and circumstances, a decision either way would have been within the discretion of the court.

People v. Roldan (2005) __Cal.4th __
Conflict of Interest
Criminal Law

In this case, the Supreme Court contemplated whether criminal defendant was entitled to reversal of his conviction because defense counsel labored under a conflict of interest stemming from defendant's threats against defense counsel's life. While the Supreme Court emphasized that no rigid rule exists to preclude relief whenever a claimed conflict of interest with counsel originates from defendant's own actions, the Court nonetheless determined that the trial court reasonably concluded that defendant, by his threats to counsel, was simply trying to delay his trial. The Supreme Court reasoned that while these were difficult circumstances under which to work, they fell short of demonstrating defense counsel was burdened by either an actual or potential conflict of interest.

Rompilla v. Beard (2005) 125 S.Ct. 2456
Ineffective Assistance of Counsel
Defense Counsel's Duty to Investigate Prosecution's Evidence of Aggravation
Habeas Corpus

By a 5-4 vote, the Supreme Court granted habeas relief, holding that the defense counsels' failure to examine a court file on the defendant's prior conviction at the sentencing phase of his capital murder trial fell below the standard of reasonable performance. Rompilla was found guilty of murder and the State sought the death penalty based on aggravating factors, including the fact that he had a significant history of felony convictions indicating the use or threat of violence. On appeal, Rompilla claimed ineffective assistance of counsel under **Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).** Under **Strickland**, an attorney's performance is judged by an objective standard of reasonableness under prevailing professional norms. Id at 688. Writing for the majority, Justice Souter noted that defense counsel had not ignored their duty and had attempted to develop mitigating evidence by interviewing Rompilla, his family, and mental health experts, though without much success. The Court nevertheless held that the defense counsels' failure to examine the court file on Rompilla's prior rape conviction fell below the standard of reasonable performance because counsel knew the prosecution intended to introduce the testimony of his rape victim from the file as an aggravating factor, and the file was a public record that was available in the same courthouse. Also, the prosecution's evidence would

largely nullify the defense argument that residual doubt about his guilt should militate against the death penalty. Counsels' obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out, and required them to learn the details and rebut the relevance of the evidence from the prior case. In support of this conclusion, the Court cited the ABA Standards for Criminal Justice, which state, in part: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities." The Court concluded that if the lawyers had looked at the file on Rompilla's prior conviction, they would have found a range of mitigation leads that were available from no other source. Concurring, Justice O'Connor wrote that the Court was not imposing a rigid requirement to review the case file of any prior conviction that the prosecution might rely on at trial, and reiterated that the attorney's behavior was not reasonable under the circumstances of the case.

In re Ronald Silverton on Discipline (2005) 36 Cal.4th 81
Attorneys Fees
Business Transactions with Clients
Disbarment

An attorney previously disbarred and reinstated to the practice of law was disbarred a second time for his violation of California Rules of Professional Conduct 4-200 and 3-300 in negotiating a compromise of his client's medical bills and retaining the monies received in addition to his original contingent fee. The Supreme Court, on its own motion, granted review of the Review Department's decision and found that the recommendation of two months stayed suspension and 60 days actual suspension from the practice of law was insufficient in light of Silverton's previous disbarment. The arrangement involving a compromise of the client's medical bills was a transaction, in that the authorization to compromise constituted an immediate transfer from the client of both the ownership and possessory interest in all funds remaining after the payment of the client's distributive share of the settlement and the payment of the attorney's fees as called for in the original retainer agreement in exchange for an upfront payment by the attorney.

The State Bar of California Standing Committee on Professional Responsibility and Conduct
CALBAR Formal Opinion No. 2004-166
Advertising and Solicitation
Internet Chat Rooms

In Formal Opinion No. 2004-166, the Standing Committee on Professional Responsibility and Conduct (COPRAC) considered a situation in which a personal injury lawyer joined an Internet chat room created for victims and families of a recent mass disaster, and introduced herself as a lawyer, hoping to prompt chat room participants to hire her to perform legal services. The issue presented was whether this participation in the chat room by the lawyer was subject to regulation under California law, and specifically,

whether it violated Rule 1-400 of the Rules of Professional Conduct governing advertising and solicitation. COPRAC concluded that the lawyer's participation constituted a "communication" under Rule 1-400(A), but not a prohibited "solicitation" under Rule 1-400(B) & (C) because solicitation is defined as a communication delivered in person or by telephone, and the Committee was unwilling to conclude that an Internet communication is delivered by telephone for purposes of the Rule. Although not a solicitation, COPRAC found that the lawyer's participation in the chat room violated subdivision (D)(5) of Rule 1-400 which bans the transmittal of communications which involve "intrusion, coercion, duress, intimidation, threats, or vexatious or harassing conduct." The Committee concluded that since victims and families visit the chat room for emotional support and do not expect to encounter a lawyer hoping to be retained, the lawyer's participation was intrusive and caused duress. COPRAC also concluded that the lawyer's participation in the chat room violated Standard 3 to Rule 1-400, which presumes improper any communication delivered to a prospective client whom the attorney knows or reasonably should know may not have the requisite emotional or mental state to make a reasonable judgment about retaining an attorney.

CALBAR Formal Opinion 2004-167
Advertising and Solicitation
Use of Trade Name or Professional Designation
Current or Former Government Title

Any message or offer by a lawyer concerning his or her availability for professional employment is deemed a "communication" under Rule 1-400. Firm names and letterheads are communications, and must not only be truthful but also not confusing or deceptive under Rule 1-400(D). In Formal Opinion No. 2004-167, COPRAC considered whether a firm trade name or a lawyer's use of a government title was confusing or deceptive in three situations. First, the Committee concluded that a private law firm named The Workers Compensation Relief Center was misleading because it suggested a connection between the firm and a state agency, in violation of Standard [6] to the Rule, and appeared misleading as to the type of services being offered. Second, COPRAC concluded that an attorney who also serves as a part-time government official could not include her official title on her firm letterhead or business cards without violating Standard [6]. However, Standard [6] would not prohibit the lawyer from listing her government position in her resume or firm brochure, or from claiming expertise on government law due to her work as a government official. Third, the Committee concluded that lawyers who no longer hold a government position may not use their former title in their firm's name or on their letterhead without including an express qualification that they are retired or that the title refers to a former position.

ABA Standing Committee on Ethics and Professional Responsibility
American Bar Association Formal Opinion 05-434
Conflicts of Interest
Estate Planning

The opinion addresses whether, under the Model Rules of Professional Conduct, a conflict of interest exists where a lawyer retained by a testator to disinherit a beneficiary also represents the beneficiary on unrelated matters. *Opinion*: There ordinarily is no conflict of interest unless the lawyer's responsibility to the beneficiary will materially limit his/her representation of the testator or doing so would violate a legal obligation of the testator to the beneficiary. There is no direct adversity here inasmuch as: (a) the preparation of an instrument disinheriting a beneficiary is a straightforward task; and (b) a potential beneficiary has no legal right to anything, only an expectancy interest. However, a concurrent conflict of interest does exist if there is a substantial risk that the lawyer's representation of the testator will be materially limited by the lawyer's responsibility to the beneficiary. The risk of the attorney's relationship with the beneficiary materially limiting the duty owed to the testator increases if the testator seeks the advice of the lawyer regarding whether, rather than how, to disinherit the beneficiary.

American Bar Association Formal Opinion 05-435
Conflicts of Interest
Insurance Counsel

The opinion addresses the ethical obligations under the Model Rules of Professional Conduct of a lawyer who represents a liability insurer named in litigation who simultaneously represents a client against an insured of the liability insurer. The question is governed by the Rules of Professional Conduct, Rule 1.7 which prohibits representations by a lawyer involving a "concurrent conflict of interest." *Opinion*: Representation of plaintiff is not "directly adverse" and does not present a conflict of interest to the lawyer's representation of the insurer in another action. If the liability insurer was also a named party in the litigation, the simultaneous representation would result in direct adversity. Direct adverseness may also arise under certain circumstances, such as the lawyer's taking testimony or discovery from the liability insurer. A concurrent conflict may arise if there is a significant risk that the representation of the individual plaintiff will be materially limited by the lawyer's obligations to the insurer. A material limitation could arise if the lawyer obtains information in connection with his/her representation of the insurer, and that information would materially help the plaintiff in his claims against the insured defendant. Even if a concurrent conflict of interest exists, the lawyer may proceed if the lawyer reasonably believes he/she will be able to provide competent representation to each client, and each client gives informed written consent.

ABA Formal Opinion 05-436
Conflicts
Informed Consent to Future Conflicts of Interest
Withdrawal of ABA Formal Opinion 93-372

The Opinion applies the ABA Model Rules of Professional Conduct to the situation where a lawyer obtains a client's informed consent to future conflicts of interest. ABA Model Rule 1.7 was amended in February 2002 to permit a lawyer to obtain effective informed consent to a wider range of future conflicts than in the past, and so an opinion based on the former rule, Formal Opinion 93-372, is withdrawn. In 1993 when the prior opinion was issued, the Model Rules did not expressly address a client's giving informed consent to future conflicts of interest. However, in 2002, Rule 1.7 was revised to permit a lawyer to represent a client despite a concurrent conflict of interest if each affected client gives informed consent in writing, among other conditions. The Opinion relies heavily on Comment [22] to the amended Rule, which addresses informed consent to future conflicts: "If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel and the consent is limited to future conflicts unrelated to the subject of the representation." The Opinion states that the term "unrelated to" in the Comment should be read as meaning "not substantially related to" -- i.e., that the future matters do not involve the same transaction or legal dispute that is the subject of the lawyer's present representation, and are not of such nature that the disclosure or use of information by the lawyer relating to the present representation would materially advance the position of future clients.